



REPUBLIC OF KENYA



**Oser & 2 others v Ogada & 3 others (Civil Application E052 of 2024)
[2024] KECA 1564 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1564 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E052 OF 2024
AK MURGOR, JW LESSIT & GV ODUNGA, JJA
NOVEMBER 8, 2024**

BETWEEN

**RONNY PATRIC HERBERT OSER 1ST APPLICANT
JEANINE NATALIE BOEHLIG 2ND APPLICANT
HANOS (KENYA) LIMITED 3RD APPLICANT**

AND

**FESTUS OCHOL OGADA 1ST RESPONDENT
HANS BRUNO HUSE 2ND RESPONDENT
HENRICH GESSNER (EXECUTOR OF THE ESTATE OF WILFRED GUNTHER
OSER) 3RD RESPONDENT
REGISTRAR OF COMPANIES 4TH RESPONDENT**

*(An Application for Stay of Proceedings and Stay of Execution of the Orders
of the High Court at Mombasa (Kizito Ngweni, J.) delivered on 27th April,
2023 and 18th April, 2024 in High Court, Civil Suit No. E022 of 2020)*

RULING

1. By a Notice of Motion dated 8th May 2024 brought pursuant to Rule 5(2)(b) of the Court of Appeal rules, 2022, the applicants seek inter alia;
 - a. That there be a stay of execution of the Orders dated 27th April, 2023 and 18th April, 2024 pending the hearing and determination of the appeal or until further orders.
 - b. That there be a stay of any further proceedings of High Court Civil Suit No. E022 of 2020 pending the hearing and determination of the appeal.



- c. Alternatively, that the Court be at liberty to make any further Orders in the interest of justice.
 - d. That the costs of this application be provided for.
2. The applicants' Motion is brought on several grounds set out on its face that; the High Court granted orders on 27th April, 2023 and 18th April, 2024 appointing one Peter Huthu as a managing agent to take charge of the 3rd applicant's properties situated on Plot 1669/18 CR 13796/7 and subdivision 2124 Original Number 1689/18 CR 13796/7 (the properties) forthwith without hearing the applicants' review application dated 16th November, 2023; that the orders summarily dismissed the application without the applicants being provided an opportunity to be heard, contrary to the doctrine of natural justice; that the order dated 18th April, 2024 amounted to a final order in Civil Suit No. E022 of 2020 which is still pending hearing and if the same is executed, the intended appeal will be rendered nugatory, and the applicants are likely to suffer irreparable loss and damage which cannot be compensated.
 3. It was further contended that the applicants had also applied for leave to amend their Statement of Defence which was also summarily dismissed. They contend that unless the proceedings are immediately stayed pending the hearing of the appeal or until the application for leave to amend the Statement of Defence is heard and determined, there will be a miscarriage of justice.
 4. That further, this Court has issued injunctive orders in Civil Application No. 59 of 2019 — Dhiren Mohanlal Shah vs Hanos (K) Limited pending the hearing and determination of Civil Appeal No. 81 of 2019 involving the same parties; that the orders of the High Court dated 27th April, 2023 and 18th April, 2024 are in direct conflict with the injunctive orders issued by this Court; that the applicants have an arguable appeal which should be heard as a matter of urgency and unless the proceedings in the suit are stayed, the intended appeal, if successful, will be rendered nugatory; that the hearing of the Civil Suit No. E022 of 2020 is fixed for further hearing on the 24th, 26th and 27th June, 2024 and is part heard and the defence will close its case on 30th June, 2024 whether they are heard or not.
 5. The application is supported by the affidavit of John Gathwe, the manager of the 3rd applicant in which he reiterated to a large extent the grounds on the face of the motion.
 6. In response the 1st and 2nd respondents filed a replying affidavit sworn by Festus Ochol Ogada on 17th May 2024 in which he deposed that: the original directors of the 3rd applicant are the late Wilfred Guenther Herbert Osser, Hans Bruno Huse and himself; that they obtained a Certificate of Incorporation and that Mr. Herbert Osser purported to transfer the shares to his family, that is to the 1st applicant, the 2nd applicant and his late wife. Mr. Hans Bruno Huse filed a suit seeking to correct the anomaly and reverse the fraudulent dealings perpetrated by the applicants and their father who is now deceased. In the course of the suit, numerous applications were filed. In the meantime, they purchased the two properties on which a hotel was constructed. The restaurant situated on the properties is called Papillon Garden Bar; that previously, there was a land case between Hanos (Kenya) Limited, the 3rd applicant, and the original owner of the land in which the court ruled in favour of the 3rd applicant; that the plots are owned by Hanos (Kenya) Limited, the 3rd applicant.
 7. It was averred that the contention in court is not about the properties owned by Hanos (Kenya) Limited, the 3rd applicant, but the Directorship and Shareholding of the company in which the father to the 1st and 2nd applicant transferred the shares to them and they are now enjoying the proceeds at the expense of the real shareholders.
 8. Further, that the matter pending in this Court Civil Appeal No. 81 of 2019 was struck out and with it all the subsequent orders, and though the High Court's order of 27th April, 2023 was succinct on the way forward, the 1st and 2nd applicants flatly refused to co-operate and instead applied to the court for



appointment of a Managing agent. On 2nd November, 2023, all parties were to appoint an agent, but the applicants failed to do so; that the appointment of a managing agent was canvassed, and the court ordered the appointment of Peter Huthu as Managing Agent. The order has never been challenged by the applicants.

9. It was deponed that, it was only when contempt proceedings were filed against the applicants that they sought to file the instant application in this Court; that the contempt proceedings are to be mentioned on 3rd July, 2024. It was finally deponed that the motion before this Court is incompetent because the applicants have not filed any Notice(s) of appeal against the impugned orders; that therefore the application lacks merit, it is an abuse of the Court's process.
10. In response, the applicants have filed a further affidavit in which they depose that the Civil Appeal No. 81 of 2019 is still active and that the stay orders obtained are intact in that appeal. The deponent further deposed that the Notice of appeal in respect of the order of 18th April 2024 was duly filed on 19th April 2024 which it annexed to the affidavit together with a Memorandum of appeal where the grounds in the main are that; the learned judge was in error in dismissing both the applicants' application for review and the application seeking leave to amend the Statement of defence without giving the applicants an opportunity to be heard; and in holding that the respondents had closed their case as a result of which it had no opportunity to reply to new matters were leave to amend the Statement of defence granted.
11. When the application came up for hearing on a virtual platform, learned counsel Mr. Munyoki appeared for the applicants. In their written submissions, the applicants submitted that they have an arguable appeal and that the grounds of appeal raised in the memorandum of appeal raises serious issues that can only be canvassed in an appeal before this Court.
12. On the nugatory aspect, the applicants submitted that the High Court's orders expressly stated that the defence case was closed on 30th June 2024 whether or not the applicants were heard; that the respondents are determined to take over management of the properties of the 3rd applicant, and that if this Court does not stay the proceedings and the execution of the court's orders proceeds, the appeal would be reduced to an academic exercise and all the remedies sought by the applicants in the appeal would be overtaken by events.
13. Counsel further submitted that the orders of the High Court contradict the orders of this Court in Civil Appeal No. 81 of 2019 where the Court issued injunctive orders against the 3rd applicant to restrain it from dealing with the properties either by itself or through its agents; that the appeal was reinstated by this Court and is pending hearing and determination. This means that the question relating to the 3rd applicant's interest in the properties is pending in Civil Appeal No. 81 of 2019, but the High Court's ruling has pre-empted the outcome of this Court's decision on the ownership of the properties.
14. On their part, learned counsel Mr. Birir appeared for the 1st and 2nd respondents. In their written submissions, it was submitted that the applicants' Notice of motion cannot be sustained, firstly, because there is no Notice of appeal attached to the application to confirm that indeed the applicants intend to appeal against the court's order; that the applicants cannot lump the two orders of 27th April, 2023 and that of 18th April, 2024 and purport to seek for stay of execution when it is clear that they have not filed a Notice(s) of appeal in respect of the two orders.
15. Counsel submitted that the contest between the parties concerns the fraudulent transfer of shares of the 3rd applicant who owns the two properties; that, once the court has made a finding on the issues raised on the status of the 3rd applicant, this will automatically resolve the question of who should take



charge over the properties; that the application seeking to amend the defence was an afterthought as it was not raised during pretrial and the Judge rightly dismissed it.

16. We have considered the motion, the affidavit in support, the responses and the parties' submissions. The applicants have sought to stay the trial court order dated 27th April, 2023 that ordered that a managing agent be appointed to manage the properties, and an order of 18th April 2024 in respect of an application dated 16th November 2023 seeking to review the trial court's decision appointing Peter Huthu as a managing agent of the properties, and also dismissing an application seeking leave to amend their Statement of Defence.

17. At the outset, we begin by observing that as far as the ruling dated 27th April, 2023 is concerned, we have scrutinized the motion and cannot find any Notice of appeal in respect of that order. In the case of Patricia Cherotich Sawe vs Independent Electoral & Boundaries Commission & 4 others SC Pet. No. 8 of 2014; [2015] eKLR the Supreme Court stated:

“What is the objective purpose of the Notice of Appeal? It serves the important role of informing the relevant parties to the suit, especially the successful litigants, that their gains may be cut short, or delayed. It signals the intention to pursue an appeal. It is only fair that the parties, in the light of their legitimate anticipation, should know within the shortest time possible, whether to rest their litigious poise. It is consistent with the general rule guiding the judicial process: “litigation must come to an end.”

18. In the case of Morris Ngundo vs Lucy Joan Nyaki & another [2015] eKLR this Court held that:

“This being an appellate court, its jurisdiction is invoked first by the filing of the Notice of Appeal. Once a Notice of Appeal is filed, it is as good as an appeal having been filed. Rule 2 of the Court of Appeal Rules defines an appeal to include an intended appeal. It is thus trite law and there is a plethora of case law to the effect that this Court's jurisdiction is invoked by filing of a Notice of Appeal.”

19. Given that there is no Notice of appeal that was filed against the ruling of 27th April 2023, it becomes evident that we have no jurisdiction to determine the application for stay of execution in respect of that order.

20. Regarding the ruling of 18th April 2024, the applicants annexed a Notice of appeal dated 19th April 2024. Based on this Notice, we can proceed and determine the application for stay of execution in respect of the ruling of 18th April 2024.

21. Under Rule 5 (2)(b) of this Court rules, the threshold requirement to be satisfied in an application for stay of execution, are set out in the case of Republic vs Kenya Anticorruption Commission and 2 others [2009] eKLR thus;

“The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, the appeal or intended appeal is not frivolous, that is to say, that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds their results or success could be rendered nugatory”.

22. As to whether the appeal is arguable, the applicants' grievances are that the trial judge dismissed its application for review and the application seeking to amend the applicants' Statement of Defence without giving them an opportunity to be heard. As to whether or not this was in fact the case, is a



matter for the bench that will determine the appeal. For our part, we are prepared to give the applicants the benefit of the doubt by finding that the appeal is arguable.

23. As to whether the appeal will be rendered nugatory, the applicants state that they are apprehensive that the suit in the High Court will proceed without the appeal having been heard, which will render the appeal nugatory were it to be successful; that Civil Suit No. E022 of 2020 is part heard and further hearing is fixed for 24th, 26th and 27th June, 2024 and the defence will close its case on 30th June, 2024 whether it is heard or not.
24. A consideration of the record and pleadings before us, discloses that indeed, in the ruling of 18th April 2024, one of the orders of the High Court was that:

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“h. The matter shall proceed for all defendants hearing on 25th, 26th and 27th June 2024.

The defence case shall stand closed on 30/6/2024.”

25. When the instant application that was heard on 1st July, 2024 by this Court is considered in the light of the trial court's order above, we take the view that the application has come too late in the day, since the defence closed on 30th June 2024. As a consequence, it has undoubtedly been overtaken by events, and there is nothing for this Court to stay.
26. In sum, the applicants having failed to satisfy the two limbs prescribed by Rule 5 (2) (b), the Notice of motion dated 8th May 2024 is dismissed with costs to the 1st and 2nd respondents.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF NOVEMBER, 2024

A. K. MURGOR

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

